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DISCRIMINATION AGAINST INDIGENOUS PEOPLES

Transnational investments and operations on the lands of indigenous peoples

Report of the United Nations Transnational Corporations and Management Division submitted pursuant to Sub-Commission resolution 1990/26

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Summary

This is the third annual progress report of the Transnational Corporations and Management Division to the Working Group on Indigenous Populations in accordance with the mandate contained in Sub-Commission resolutions 1989/35 of 1 September 1989, 1990/26 of 31 August 1990, and 1991/31 of 29 August 1991. Whereas last year's report presented a broad overview of the policy issues obtained from summarizing the indigenous responses to the questionnaires and analysing the socio-cultural impact by sector of economic activity, this year's report takes an in-depth view of a number of case-studies in order to further refine the policy issues and make tentative recommendations.

Each case-study was researched using questionnaires, independent published sources and, where possible, information solicited from international and intergovernmental agencies and the transnational corporations themselves. The case-studies focus on the problem of making indigenous participation in decision-making effective. Guidelines for such participation are contained in various international conventions and declarations such as the International Labour Organisation's Convention on Indigenous and Tribal Peoples in Independent Countries, No. 169 (1989), the draft United Nations Declaration on the Rights of Indigenous Peoples and the Rio Declaration and Agenda 21 of the United Nations Conference on Environment and Development.

Projects planned and implemented in cooperation with indigenous peoples reportedly involved less adverse impact and more benefits for the indigenous peoples in question. There is also a greater likelihood that the projects will proceed without costly interruptions. Thus, such participation can increase the returns to transnational corporations while decreasing their risks. This year's report takes a closer and more thorough look at the nature and quality of indigenous participation. It is the intent of this report to explore existing modalities of participation with a view to making recommendations to increase their effectiveness in the future.

Introduction

1. In the report of its seventh session in 1989, the Working Group on Indigenous Populations recommended that the United Nations Centre on Transnational Corporations (UNCTC) assist the Working Group "in preparing a database on transnational investments and operations on indigenous peoples' lands and territories, and in particular those lands which are currently in dispute" (E/CN.4/Sub.2/1989/36, annex I). The Sub-Commission on Prevention of Discrimination and Protection of Minorities endorsed this recommendation in its resolution 1989/35 of 1 September 1989.

2. Following technical consultations with the United Nations Centre for Human Rights, UNCTC proposed a methodology for this database, and for future annual reports to the Working Group, including a draft questionnaire (E/CN.4/Sub.2/AC.4/1990/6). The Working Group expressed its appreciation to UNCTC, decided to include the questionnaire as an annex to the report of its eighth session, encouraged all parties to provide UNCTC with the requested information, and invited UNCTC to report to its ninth session (E/CN.4/Sub.2/1990/42, annex I). Sub-Commission resolution 1990/26 of 31 August 1990 reaffirmed this decision of the Working Group.

3. A preliminary report was submitted to the Working Group in 1991, providing a general overview of the distribution of indigenous peoples of the Americas and their spatial relationship to areas of particular economic significance (fisheries, forests, and minerals), as well as a general review of inter-relationships between transnational operations and investments and their environmental, economic, social and cultural impact on indigenous peoples (E/CN.4/Sub.2/1991/49). UNCTC expressed the hope that the geographical breadth and quantitative detail of its future reports could be improved, with the cooperation of indigenous peoples' organizations. The Working Group expressed its appreciation to UNCTC for its report, and encouraged indigenous peoples to participate actively in this study in the future (E/CN.4/Sub.2/1991/40, annex I, para. 12). The report by UNCTC was also welcomed by Sub-Commission resolution 1991/31 of 29 August 1991.

4. In February 1992, UNCTC became the Transnational Corporations and Management Division (TCMD). This is the third annual report of TCMD to the Working Group on Indigenous Populations in accordance with the mandate contained in Sub-Commission resolutions 1989/35, 1990/26, and 1991/31.

I. STATUS OF THE DATABASE

5. Copies of the questionnaire were mailed in 1990 to (a) indigenous organizations which had registered at previous sessions of the Working Group, (b) organizations listed by the Inter-American Indian Institute as national indigenous organizations, and (c) Indian tribes and Alaska Native entities identified by the Government of the United States of America. This initial distribution of the questionnaire reached more than 500 organizations and communities in nearly 40 countries. Approximately half of these organizations and communities were located in the United States of America, however, because more comprehensive lists of addresses were available.

6. Follow-up letters were sent to all organizations and communities which had not responded to UNCTC within six months. In addition, an effort was made to contact each national indigenous organization in Latin America by telephone in April and May 1991. Participants at the ninth session of the Working Group in July 1991 were asked to identify significant indigenous organizations in their regions, and a detailed list of Canadian indigenous organizations and communities was prepared with information provided by the Government of Canada. Questionnaires were mailed to these organizations and communities in autumn 1991, and follow-up letters were again sent to all non-respondents. Work began on an expanded list of African, Asian and Pacific organizations in June 1992.

7. To supplement the information obtained from these questionnaires, TCMD has continued to review a wide range of secondary sources, and to pursue consultations with the World Bank, and relevant United Nations operational programmes and specialized agencies. The present report has also benefited from the generous assistance of university interns, and from technical support provided by the Apamuwek Institute, a research centre owned by and serving the Mikmaq people of Nova Scotia, Canada.

8. Readers of this third report are encouraged to direct questions, corrections, and supplementary information to Lorraine Ruffing, TCMD, United Nations, Room DC2-1318, New York, NY 10017, or via telefax (212) 963-3062. All indigenous organizations that have received the questionnaire are encouraged to complete and return it, and to share copies with others.

II. RESEARCH AIMS AND METHODOLOGY

9. The number and geographic distribution of questionnaire responses received to date are inadequate to construct a meaningful statistical portrait of the activities of transnational corporations on indigenous lands. It was thought more useful, at this stage, to develop a small number of case-studies based on situations already brought to the attention of TCMD, and use them to identify broad policy issues. Each case-study was researched using questionnaires, independent published sources and, where possible, data solicited from international and intergovernmental agencies and the transnational corporations (TNCs) themselves.

10. These studies include an expanded version of the Quebec Cree case included in last year's report, and new studies of the Mohawk Nation (United States), the Blackfeet Nation (United States), and the Kuna people (Panama). Selections were based on the availability of reliable data, and the usefulness of these cases for illustrating basic principles. Careful consideration was given to including some further elaboration of last year's case-study of the Red Dog Mine in Alaska, for which additional but conflicting data have been received from all parties, and it was decided to continue to monitor developments and seek clarification of the results of ongoing environmental testing by COMINCO and the State of Alaska.

11. The annexed case-studies and discussion focus on the problem of making indigenous participation in decision-making effective. In last year's report, it was suggested that "indigenous participation is a significant factor

in TNCs' environmental performance" (E/CN.4/Sub.2/1991/49, para. 52). Projects planned and implemented in cooperation with indigenous peoples reportedly involved less adverse impact, and more benefits for the indigenous peoples in question. There is a greater likelihood that the projects will proceed without costly interruptions. Thus, such participation can increase the returns to TNCs while decreasing their risks. This year's report takes a closer and more critical look at the nature and quality of indigenous participation. The case-studies present a variety of experiences ranging from no formal participation, to participation only in remedial efforts after problems arise, to the Cree, Blackfeet and Kuna cases, where there was some degree of organized participation in planning from the start, but with varying success. These cases show that participation is a very complex issue, and one that requires careful consideration of local conditions.

III. RELEVANT INTERNATIONAL DEVELOPMENTS

12. This may have significant implications for United Nations law and policy. "Collaboration" and "cooperation" with indigenous peoples is required of States parties to the International Labour Organisation's Convention on Indigenous and Tribal Peoples in Independent Countries, No. 169 (1989), and these principles are restated in the draft United Nations Declaration on the Rights of Indigenous Peoples, which may soon be submitted for approval to the General Assembly. Both instruments anticipate far greater indigenous control of lands and resources, and a larger role for these peoples in environmental decision-making, but offer little guidance for States as to the modalities which may be most appropriate for sharing decision-making responsibilities. Should indigenous peoples gain much greater control over their lands, moreover, they, rather than national Governments, would bear primary responsibility for negotiating any sale or lease of resources to TNCs, a task for which many may be unprepared and require substantial technical assistance. It is the intent of this report to explore existing modalities of participation, with a view to making recommendations to increase their effectiveness in the future.

13. The Rio Declaration of the United Nations Conference on Environment and Development, June 1992, likewise recognizes the vital role of indigenous peoples in environmental management and development, and urges States to "enable their effective participation" in sustainable development (Principle 22). Agenda 21, adopted together with the Rio Declaration, calls upon States, "in full partnership" with indigenous peoples, "to empower indigenous people and their communities" through measures that include, inter alia:

> (iii) Recognition of their values, traditional knowledge and resource management practices with a view to promoting environmentally sound and sustainable development; ...
>
> (b) Establishment, where appropriate, of arrangements to strengthen the active participation of indigenous people and their communities in the national formulation of policies, laws and programmes relating to resource management and other development processes that may affect them, and their initiation of proposals for such policies and programmes;

(c) Involvement of indigenous people amd their communities at the national and local levels in resource management and conservation strategies and other relevant programmes ... [;]

and, in many cases, "greater control over their lands, self-management of their resources, participation in development decisions affecting them, including, where appropriate, participation in the establishment of protected areas" (Chapter 26, paras. 26.3 and 26.4). Agenda 21 also calls on international financial and development-aid institutions to devise procedures to ensure that indigenous peoples are "informed and consulted and allowed to participate" in decisions affecting their resources (para. 26.4 (a)). The design of such procedures may pose a significant challenge for United Nations agencies in coming years. It poses a special challenge to TCMD since its Advisory Services Branch frequently assists in negotiating natural resource development contracts between TNCs and third world countries. The question which TCMD will have to examine is how indigenous peoples can be meaningfully involved in such negotiations.

14. The United Nations Meeting of Experts to review the experience of countries in the operation of schemes of internal self-government for indigenous peoples, at Nuuk, Greenland, on 24-28 September 1991 (E/CN.4/1992/42), concluded that, inter alia:

> 6. The autonomy and self-government of indigenous peoples are beneficial to the protection of the natural environment and the maintenance of ecological balance which helps to ensure sustainable development.

The expert meeting emphasized the importance of developing independent and impartial mechanisms for resolving any disputes between national Governments and indigenous peoples over their respective competences, once arrangements have been made for autonomy or self-government; and that institutions of indigenous self-government should ensure respect for human rights and popular participation in public affairs. Greater indigenous involvement in decision-making will not be a simple matter, but will give rise to new kinds of disputes between indigenous peoples and States, and within indigenous communities themselves.

15. At the regional level, efforts are underway to establish a fund for the development of the indigenous peoples of Latin America and the Caribbean. The Government of Bolivia, which initiated the proposal in September 1991, has been meeting with intergovernmental organizations such as the Inter-American Development Bank, Organization of American States, International Labour Organisation, United Nations Development Programme, and United Nations Educational, Scientific and Cultural Organization to develop the fund's mandate and charter. Drafts adopted by the Second Technical Meeting held at Washington, D.C., on 9 December 1991, propose direct indigenous representation at all levels of the management of the fund. It is therefore likely that the fund, if established, would stimulate the development of formal arrangements for the co-management of resources and shared decision-making in those countries receiving its assistance.

16. It is appropriate to note that the theme recently chosen by the General Assembly for the International Year for the World's Indigenous People is "Indigenous people - a new partnership" (General Assembly resolution 46/128 of 17 December 1991). At the first Technical Meeting convened to devise a programme of activities for the International Year (E/CN.4/1992/AC.4/TM/8), the participants stressed a "participatory approach to development", and the need to respect indigenous land rights and "establish mechanisms for indigenous participation in planning, implementation and evaluation of international assistance". Achieving these aims will require a much better understanding of the most effective means of empowering indigenous peoples under different national and local conditions.

IV. DISCUSSION OF CASE-STUDIES

17. The case-studies presented in this report are considerably varied and permit a number of useful comparisons. With respect to stages of industrialization, for example, the Crees are responding to the expansion of a new hydroelectric programme, while the Mohawks live in an enclave surrounded by ageing factories and decades of accumulated toxic waste. The settings range from a small industrializing country (Panama), to highly industrialized countries (Canada and United States). The TNCs involved differ in parentage: United States firms dominate developments in the United States itself as well as Panama, while European firms play a major role in Quebec.

18. All of these cases involve some degree of indigenous control over development, but the modalities vary widely. The Crees of Quebec rely on a comprehensive treaty with Canada, which they believed guaranteed them a decisive voice in resource management. Although the treaty has the force of a constitutional provision under Canadian law, this does not appear to have been fully effective under the prevailing political conditions in that country. Moreover, the treaty under which the Cree hold rights to the lands in question establishes a complex evaluation procedure for new development projects, in which Cree may participate fully, but which merely formulates recommendations to be considered by the Government. This arrangement typifies what might best be described as a consultative form of participation, in which indigenous peoples' representatives have the right to be heard, but no means (other than the force of persuasion) of influencing the outcome. It should be noted, also, that the administrative complexity of the consultative process creates the appearance that consultations are important and will be decisive, while in fact it simply raises the cost.

19. The Blackfeet case illustrates these problems in another national setting. Within their reservation, the Blackfeet enjoy some limited legal powers of land management and ownership. They cannot dispose of their natural resources without the approval of the government department responsible for public lands and indigenous peoples, but they do have the right to veto any development of their own lands, or to negotiate the terms under which their lands will be developed. With respect to the development of adjacent lands, however, their legal rights are no greater than the rights of other citizens, i.e., to participate in an environmental review process which makes recommendations to government agencies. The case is complicated by the fact that the courts have weakened national legislation intended to protect

indigenous cultural interests in public lands. There is also division within the Blackfeet community itself over the environmental costs and overall acceptability of future land development. The community does not appear to have an effective mechanism for consensus-building.

20. Like the Blackfeet, the Mohawks of Akwesasne enjoy, in principle, limited legal control of their own reservation, but do not enjoy any distinct legal rights with respect to adjacent lands. The Mohawk case illustrates clearly the difficulty in protecting indigenous lands where there is little or no control over adjacent lands which contain toxic wastes. The Mohawks were able to participate in the management of adjacent lands only after problems appeared, and even now their role is merely consultative, like that of the Crees. Their ability to use this consultative role effectively depends on obtaining outside funding for research, moreover, since the effectiveness of persuasion rests on producing better scientific data. At the same time, the Mohawks are fortunate that a governmental agency shares their concerns, and has supported their effort to obtain funding and pursue their own research. Unlike Hydro-Quebec, which has government support, the aluminum smelters and foundries operating near Mohawk lands are regarded as a problem by the Government. This may be due not so much to the different environmental policies of the United States of America and Canada, as to the fact that the United States plants are ageing and of declining economic importance.

21. The Mohawk case is complicated by the fact that the reservation straddles an international boundary, creating jurisdictional problems and making participation by indigenous peoples more costly and perhaps less effective. Canada and the United States have adopted several agreements on transboundary pollution, and the joint management of migratory fish and wildlife. Only one of these agreements, the 1985 Pacific Salmon Treaty, provides explicitly for indigenous participation in the joint management regime it created. Agenda 21 encourages the involvement of indigenous peoples in future environmental cooperation at the regional and international levels (Chapter 26, paras., 26.5 (a) and 26.6 (b)), anticipating the kinds of problems confronted by the Mohawks.

22. The Mohawks share another problem with the Blackfeet: the lack of an effective mechanism for building internal consensus. In the Mohawk case this has meant that some disputes over the control and direction of development have assumed a tragic, violent character. Fortunately, protecting Mohawk lands from toxic waste is a matter on which there is little disagreement, but other development issues are less clear-cut. In common with other indigenous peoples in North America, Mohawks have been subjected to efforts to modernize their political system and to make their way of life more individualistic, competitive and market-oriented. The result of these externally imposed values has been the emergence of distinct, often contradictory socio-economic interests, represented by competing political organizations within the community. When there is an opportunity to participate in environmental decisions, different organizations compete for access, denying one another's representativeness and legitimacy.

23. The Kuna of Panama, by comparison, have been highly successful in maintaining a coherent environmental policy and exercising control of their lands and resources. This can be attributed to external as well as internal

factors that distinguish them from the other three cases. The Kuna are well organized and have had an opportunity to modify and adapt their traditional political system, rather than having European forms of organization imposed upon them. For several generations, the Kuna have also maintained a relatively stable, traditional economy in their own villages, while taking advantage of education and employment opportunities elsewhere. They have been able to participate on their own terms in national society, while retaining a home base that is, in most respects, distinctly Kuna. At the same time, the Kuna have been fortunate in dealing with a relatively small State, which has limited power and has allowed them a considerable degree of internal autonomy. Kuna are also fortunate in not having been as attractive to developers as other indigenous peoples in their region. They might have been less successful in pursuing their own independent development path had they been endowed with more commercially valuable natural resources. It is also significant that their territory is biodiverse and has scientific interest, so that the Kuna were able to recruit support from both the scientific and environmentalist communities.

24. Five basic issues emerge from these case-studies, relevant to the design and evaluation of participatory mechanisms for management of indigenous peoples' lands:

(a) Whether participation is merely consultative, or involves a right to give or withhold consent to proposed development (as suggested by recent international instruments and studies in this field);

(b) Whether indigenous peoples enjoy a special participatory role only with respect to lands they actually own and occupy, or whether this right extends to activities which threaten their lands and the ecosystems on which they depend;

(c) Whether participatory mechanisms are of such complexity that they become unduly burdensome, costly, confusing and ineffective, thus undermining the right to participate;

(d) Whether indigenous peoples have adequate internal mechanisms, either traditional or adapted, to build and maintain a consensus, and, if not, whether participatory mechanisms at the national level provide opportunities for all interest groups within indigenous communities to be involved;

(e) Whether, in view of the relative size of indigenous peoples, their resources, and the commercial interests at stake in particular countries, participatory mechanisms provide for a genuine balance of power between indigenous peoples and developers.

25. Several tentative conclusions may be proposed, subject to further exploration and elaboration in future reports:

(a) When participation is only consultative, its effectiveness depends on preparing better scientific research, which is costly for indigenous peoples, and makes them dependent upon outside linkages or funding;

(b) Since development on adjacent lands affects the ecosystems on which indigenous peoples' self-development depends, the right to take part in decision-making should not be limited to lands which indigenous peoples own or occupy;

(c) No participatory process, however accessible and transparent, is an adequate substitute for the right to give or withhold consent to development;

(d) Strengthening indigenous peoples' own political systems is an essential step towards their effective control over their own natural resources and environment.

V. DIRECTIONS FOR FUTURE WORK

26. In the future work of TCMD in this field, a high priority must be given to expanding the geographical breadth of the database. This can be accomplished only with the support and cooperation of indigenous peoples. More attention will also be devoted to obtaining parallel information from Governments, and from transnational corporations themselves, to enrich the detail and improve the reliability of the database.

27. The database must become "dynamic". In other words it must begin to reflect changes over time, in particular changes in global economic conditions, changes in national laws and policies, and changes in the responses made by indigenous peoples and their own institutions. This will require going beyond a single questionnaire, to a network of many data-gathering projects, operated by cooperating indigenous peoples in different countries and regions. This would be consistent with goals the General Assembly has set for the International Year for the World's Indigenous People.

28. In its comments on the second report, the Working Group noted that indigenous participation in this study may be limited, in some countries, by indigenous peoples' lack of persons trained to collect the demographic and economic data required (E/CN.4/Sub.2/1991/40, annex I, para. 12). The Working Group therefore encouraged TCMD to seek budgetary and extrabudgetary resources for the development of a programme of technical assistance to indigenous peoples, in particular in the field of environmental monitoring. TCMD could pursue this idea within the framework of Agenda 21, and the programme of activities for the International Year for the World's Indigenous People. In so doing, TCMD considers it is important to employ indigenous organizations and individuals, wherever possible, in providing technical assistance.

29. The next report will present additional case-studies relevant to the design of participatory mechanisms, and, in accordance with Agenda 21, effective arrangements to ensure for indigenous peoples "greater control over their lands [and] self-management of their resources".

VI. RECOMMENDATIONS

30. It is of the utmost importance that the Working Group continue to inform indigenous peoples about the TCMD study, and encourage them to participate actively in data-gathering. Use of the database (with due regard to its current limitations) by the Working Group itself should help to strengthen indigenous peoples' commitment to this research.

31. In its resolution 46/128 of 17 December 1991 the General Assembly recommended that specialized agencies, regional commissions, and other organizations of the United Nations system consider what contributions they could make to the success of the International Year for the World's Indigenous People. The proposed programme of activities for the International Year, adopted by the General Assembly and annexed to its resolution 46/128, includes two proposals in its section C of particular relevance to the current and planned work of TCMD in this field:

> (e) Establishing networks of indigenous organizations and communities for the sharing of information and experience in particular fields, such as health care, bilingual education, resource and environmental management;
>
> (f) Contracting or secondment of indigenous organizations and persons with relevant expertise in carrying out projects for the benefit of indigenous communities throughout the world[.]

32. Consistent with the foregoing recommendations made by the General Assembly, the Working Group may wish to consider the usefulness of the following activities, which could be launched in connection with the observance of the International Year:

(a) Establishing an electronic network, with United Nations sponsorship and support, for the sharing of environmental information among indigenous peoples in different parts of the world;

(b) Developing a technical cooperation programme, with appropriate United Nation agencies and indigenous organizations with relevant expertise, to assist Governments and indigenous peoples in designing mechanisms for sharing responsibility for natural resource management;

(c) Developing a technical cooperation programme, with appropriate United Nation agencies and indigenous organizations with relevant expertise, to help indigenous peoples strengthen their capacity for negotiating with transnational corporations, and conducting environmental assessments;

(d) Developing an arrangement whereby a wider variety of appropriate United Nation bodies and specialized agencies, including those in the fields of social development, health and education, may collaborate in preparing a more comprehensive annual United Nation statistical report on the conditions of indigenous peoples around the world and including this in the annual Report on the World Social Situation.

Annex

CASE-STUDIES

1. The Cree of northern Quebec, Canada, and hydroelectric development

1. In the James Bay region of northwest Quebec, Hydro-Quebec is planning the second phase of a massive hydroelectric project that would further affect the ancestral lands and waters of the Cree people. For thousands of years, the Cree, who have a current population of approximately 12,000, have lived on the lands surrounding James Bay. 1/ Hydro-Quebec is a State-owned transnational corporation which produces and supplies electricity for national and international consumption. It is owned by the Province of Quebec and ranks as the third largest public utility in North America, with assets in 1990 valued at Can$ 36,684 million. 2/ Hydro-Quebec's subsidiary, Hydro-Quebec International, has provided technical assistance for hydropower development in over 30 countries.

2. The Government of Quebec announced the development of the James Bay hydropower project in 1971. The construction could span 30 years and would create a series of dams along the rivers leading to James Bay and create a generating capacity of 27,368 megawatts. 3/ The project was put under the supervision of Hydro-Quebec which had become the provincial public utility in the 1960s when "the Quebec Government nationalized electric power as a step in its drive for economic, and perhaps ultimately political, independence." 4/ Hydroelectric power has since been a cornerstone of Quebec's national development policy, accounting for 5 per cent of its gross domestic product. 5/ At the time of the announcement, Quebec's electricity needs were growing at 7 per cent annually. 6/ The James Bay project would thus provide the electric power for domestic demand in the short run, and in the long run provide economic self-sufficiency through industrial and international contracts.

3. James Bay is the southern extension of Hudson Bay, bounded on the north and east by Quebec and on the west by Ontario. At the time of the announcement of the hydroelectric project, James Bay was largely an untouched wilderness, home to the world's largest caribou herd, largest beluga whale population, two thirds of the world's known resident freshwater seal habitats, and one of the world's largest boreal forests. As Canada's largest wetland, James Bay also provides North America's primary migratory waterfowl area. 7/

4. Neither the Cree nor Inuit peoples had been informed of the James Bay development plan prior to its announcement, nor had any environmental impact assessment been conducted since this was not required by law at the time. Sensing that their way of life was in imminent danger the Cree, led by Chief Billy Diamond, and the Inuit, led by Charlie Watt of the Northern Quebec Inuit Association, sought a court injunction to halt construction of the project. In November 1973, a Quebec court awarded a temporary injunction. Seven days later, however, a court of appeal overturned the decision. To put an end to this litigation, the affected parties agreed to negotiate. Since construction was already underway during the court proceedings, the Cree and Inuit contend

that they saw no choice but negotiation. It was their last chance to mitigate the impact they thought the James Bay project would have upon the environment of the Bay, and consequently to their way of life. The result was the James Bay and Northern Quebec Agreement (1975), hereafter "the Agreement".

5. The Cree argue that this court-ordered agreement was a long overdue treaty. Cree ancestral lands were ceded to the province of Quebec in 1912 by the Government of Canada without Cree knowledge or consent on the condition that all outstanding aboriginal claims and disputes would be settled. This was not done. Moreover, the services and benefits secured to the Cree by the Agreement were basic rights enjoyed by non-native Quebec citizens, which until the proposed development of James Bay, the Canadian and Quebec Governments had neglected to provide. The preamble to the Agreement states: "The inhabitants of Quebec's North, like everybody else, have to have schools. They have to be able to depend on health services. They have to have the security of justice and a system of law enforcement." It goes on to say: "These are all steps that would have to be taken, these are all services that would have to be provided and developed anyway, regardless of whether or not there was a James Bay project." 8/

6. The Cree, moreover, assert that the negotiation process was biased and manipulative. A senior member of the Canadian House of Commons agreed and, at the time of the approval of the Agreement stated: "It is not acceptable that we approve of a process which has had the effect of forcing upon native people in a distant part of this land agreements which in all reasonable likelihood they would not have accepted had they been able to negotiate free of the constraints that were placed upon them." 9/

7. The Agreement divided all lands in the disputed territory into three categories:

(a) Category One: Land allocated to native peoples for their exclusive use. The Quebec Government maintains the right to use the land for public purposes such as infrastructure and utilities, in which case it must provide replacement land or compensation;

(b) Category Two: Land on which native people may hunt, fish and trap but have no rights of occupancy. Quebec maintains the right to develop these lands, but must provide replacement land if it does so;

(c) Category Three: Lands on which native people may hunt, fish and trap; however, the land is considered public land open to use by all Quebecers.

8. The Government of Canada agreed to pay the Cree Can$ 225 million over a period of 20 years for their lands. The Agreement also created a Cree police force, Cree School Board, and a Cree Board of Health and Social Services which some believe has contributed to decreased infant mortality rates, increased life expectancy and lower rates of tuberculosis in the Cree villages. The Agreement also created a Cree Hunters and Trappers Income Security Programme which provides a guaranteed minimum income to Cree who spend at least 125 days each year in the bush, offering economic security to those Cree who choose to

continue their traditional lifestyle. Finally, the Agreement created an environmental review process through which the Cree could participate in the evaluation of any future development in the James Bay region. 10/

9. Since the signing of the Agreement, the Cree and Hydro-Quebec have disagreed over its intent. The Cree understood the agreement to prohibit further development without Cree consent. Hydro-Quebec asserts that the agreement explicitly permits future development, provided that the environmental review process is followed, and stresses that, as stated in section 8.1.3 of the Agreement, sociological factors are not grounds for halting future development. The Cree maintain that section 8.1.3 merely illustrates the duress under which they signed the agreement, for no community would willingly surrender their cultural survival. The Cree also claim that the education, health and justice provisions of the Agreement have not been fulfilled as promised. However, from 1975 to 1991, $Can 139 million has been paid into an income security programme which allows the Crees to devote themselves to subsistence activities.

10. Reports by the independent statutory Cree-Naskapi Commission, chaired by Justice Rejean Paul, concluded that the Federal and Provincial Governments have been delinquent in honouring the intent of the treaty. In its 1991 report the Commission stated: "the Federal Government interprets the Agreement too narrowly and the federal position does not conform to what the courts have said about interpreting Indian treaties and agreements." 11/ In 1988, the Commission found that "decisions are repeatedly made by officials, negotiators and even ministers only to be repudiated later. This type of unilateral changing and repudiating of agreements can no longer be tolerated." 12/

11. Hydro-Quebec completed the first part of the James Bay Project in 1985, at a total cost of Can$ 16,000 million (1976 dollars). Part I of phase I of the project entailed diverting four rivers - the Eastman, Caniapiscau, Opinaca, and the Little Opinaca - into the La Grande River, doubling its flow. Nine dams were built, 206 dikes, and 5 reservoirs, which cover a total of 11,335 square kilometres. Three powerhouses were also built along the La Grande. Part II of phase I will soon complete another powerhouse near the mouth of the La Grande River and include five more generating stations for a total generating capacity of 15,800 MW. 13/

12. Hydro-Quebec now plans to construct phase II, an enormous engineering undertaking budgeted at Can$ 25,000 million. Phase II is divided into two parts. Part I, commonly referred to as the Great Whale project, entails diverting the Little Whale and Boutin Rivers into the Great Whale River and constructing three generating stations, each with its own reservoir. Part II would divert the Nottaway and Rupert Rivers into the Broadback, increasing its average flow up to 6 times, 14/ create 7 reservoirs and 11 generating stations. In total, then, phase II will construct 21 dams, 200 dikes, divert 4 major rivers and create 25,519 square kilometres of reservoir (15,519 square kilometres of which would be flooded land - the equivalent of submerging the whole of Northern Ireland) and add 13,568 MW of generating capacity to the project. 15/

13. The Cree have been joined by international environmental and indigenous peoples' organizations in opposing any further construction which they contend has already caused significant environmental and cultural damage.

14. Consensus exists among independent scientific analysts and major environmentalist groups that James Bay phase II will alter the James Bay and the wider environment. Major effects will include:

(a) Flooding: If phase II is complete, more than 15,000 square kilometres of land will be inundated, submerging not only vast forests which mitigate air pollution and global warming, but also the complex ecosystems these forests support. 16/ The flooding would also destroy extensive wetlands in James Bay, to which millions of migratory birds flock in the spring, summer and fall months to feed and rest. The proposed 2,000-square-kilometre Bienville reservoir alone would submerge caribou calving grounds, waterfowl nesting grounds and the spawning habitat and tributaries used by salmonid fish species; 17/

(b) Mercury: The flooding caused by phase I resulted in the accumulation of methylmercury in the reservoirs apparently due to the rotting of submerged organic matter. Mercury then bio-accumulated in the fish and other organisms living in the reservoir to dangerously high levels. The level of mercury in James Bay fish since construction of the reservoirs has increased sixfold. 18/

15. This has had deleterious effects on the Cree because fish formed a large part of their diet. In 1984, two-thirds of the Cree living in the village of Chisasibi were found to have mercury levels significantly exceeding the World Health Organization (WHO) safety level. 19/ WHO established an exposure standard of 6 mg/kg in hair. For the most exposed group of male and female trappers, 40 years and over, the most recent average mercury contents for three affected communities varies from 8.3 to 13.8 mg/kg. The maximum varies from 23.9 to 43.1 mg/kg in the affected communities. The Cree Board of Health and Social Services has established its own standards. The limits of intervention among the Cree are 15 mg/kg of mercury in hair for women of child-bearing age and 30 mg/kg of mercury for adults in general. A content in hair of 60 mg/kg or more is considered a risk. 20/ This led to the signing of the Mercury Agreement in 1986 by Hydro-Quebec, the Province of Quebec, and the Cree which provides for research, monitoring and mitigation. The implementation of the agreement was expected to cost Can$ 18 million over 10 years, to which Hydro-Quebec is contributing Can$ 12 million. 21/

16. Hydro-Quebec claims that the mercury level in the fish will return to normal in 20 to 30 years. The company also argued that once mercury levels fall, the reservoir could provide a prime commercial and sport fishing area. In the meantime, Hydro-Quebec advises the Cree to avoid eating some species of fish, limit their intake of others, and discourages certain groups of the population, including pregnant women, from eating fish altogether. Fish constitute more than a dietary staple for the Cree, however. The catching, preparation and distribution of fish also plays a central role in maintaining social and cultural institutions.

17. The Cree express concern over the effects the mercury may have as it moves through the food chain, affecting species such as herons, cranes, eagles, seals and whales. With thousands more square kilometres scheduled to be flooded in phase II, the Cree contend that the mercury problem will spread further through the ecosystem of James Bay, and the people and wildlife it supports.

Water

18. Phase I altered the normal flow levels of the La Grande River. The river originally flowed highest in spring and summer, and lowest during the winter months. In order to meet cycles of energy demand, the La Grande complex has reversed this trend, maximizing the river flow in the winter when power demand is at its peak. This flow pattern disrupts the ecosystem, negatively affecting fish spawning with unknown consequences for egg and larval survival. The reversed flow pattern also leaves coastal marshes and tidal flats with fewer nutrients in the spring and fall, the periods when migrating birds depend on these wetlands for food. If phase II is completed, vast quantities of freshwater will flow each year into the marine and brackish water of the eastern James Bay coastal environment, disrupting the ecological balance of this fragile ecosystem.

19. Altered water flow is also alleged to be the cause for the drowning of 10,000 caribou in 1984 as they crossed the Caniapiscau River, a traditional migration route. Hydro-Quebec claims the drowning was due to natural causes and unusually heavy rainfall, but Cree blame unnaturally high river levels due to the managed flow of the Caniapiscau reservoir.

20. Hydro-Quebec has attempted to mitigate this environmental damage by revegetating river banks, debris-recovery, and constructing fish ladders. To help native fishers, Hydro-Quebec also built boat launching ramps, navigation corridors and developed areas for net fishing. The Cree maintain that this cannot compensate for the damage caused by environmental alteration.

21. Hydro-Quebec believes that assertions of environmental damage by phase I and anticipated damage from phase II are greatly exaggerated. A Hydro-Quebec publication states: "Northern ecosystems have low biological productivity which means wildlife density per surface area is also low compared to more temperate ecosystems. Wildlife species inhabiting these areas are generally hardy pioneer species with side ecological ranges. They are adapted to highly variable living conditions and, as a result, their status was not jeopardized by development of the La Grande complex. The so-called fragility of northern ecosystems is a distortion of reality. The resilience of species living at northern latitudes has been grossly underestimated." 22/

22. The Crees fear that what remains of their traditional culture may not be so resilient. Phase I destroyed cultural sites, traditional burial grounds, and traditional hunting, fishing and trapping grounds. The 1991 Arctic Environmental Strategy: An Action Plan, published by the Government of Canada, states: "This dimension of the right to food is basic in its application to the Aboriginal peoples of Canada, whose hunting, fishing, and gathering practices form an integral part of their cultures. Not only is there a high dependence upon food thus acquired to maintain their traditional

and preferred diet, the food procurement and distribution process is the means through which societal values are transmitted". 23/ With the construction of phase II, more traditional hunting, fishing, and trapping grounds will be flooded, further eroding these cornerstone activities of Cree culture.

Roads

23. During construction of phase I, thousands of non-native workers were imported. Phase II would bring thousands more. Roads were built and now allow approximately 40,000 non-native hunters and fishers access to traditional Cree lands. 24/ Cree assert that this intrusion, coupled with the alteration of their ancestral lands and lifestyle, has led to an increase in alcoholism, drug abuse, sexually transmitted diseases, family violence and suicides, all of which scarcely existed a generation ago.

24. While Hydro-Quebec believes that any development in the James Bay area must be sensitive to native peoples in the area, it also asserts that agreements and mitigation efforts can make development compatible with traditional Cree ways of life. Hydro-Quebec maintains that the entire population of the province must be taken into account when weighing the usefulness of development projects, and that hydroelectric power offers the best balance of growth with environmental protection. Compared to fossil fuels, hydroelectric power contributes less to greenhouse gases, does not produce acid rain and is renewable. The utility also points to the economic boost that phase I contributed to the Quebec economy. From 1973-1985, of the Can$ 13.7 billion spent on construction, 77 per cent remained in Quebec: Can$ 5.6 billion in the form of wages and Can$ 4.75 billion paid to Quebec suppliers. In addition, Can$ 2.3 billion was collected by the Governments of Ottawa and Quebec as tax revenue. 25/ Hydro-Quebec claims that phase II will provide another large boost to the Quebec economy. Not only will the construction of the facilities stimulate the economy, but the contracts that Hydro-Quebec has signed to attract large smelting and refining factories will also provide jobs to many more Quebecers.

25. Opponents assert that hydroelectric power provides neither economically appropriate nor environmentally sound development, and they claim that an examination of the numerous industrial contracts which Hydro-Quebec has signed shows the uneconomic development rationale on which Hydro-Quebec operates. To secure future power demand for phase II, Hydro-Quebec has signed more than a dozen confidential contracts with transnational metal refining and aluminum smelting corporations. One contract, leaked to the press in contravention of a legal ban on its disclosure, disclosed that Hydro-Quebec agreed to sell billions of kilowatt-hours of power at a loss to Norsk-Hydro (Norway). Power that cost Hydro-Quebec (Can) 2.4 cents per kilowatt-hour to produce would be sold to Norsk-Hydro for (Can) 1.5 cents per kilowatt-hour. The cost per kilowatt-hour to the public at the time was (Can) 4.2 cents. 26/ Confidential agreements signed between Hydro-Quebec and other companies may have similar subsidies. It is estimated that these subsidized contracts account for Can$ 300 million in lost income annually for the utility. 27/

26. Opponents also question the long-term impact of these new energy-intensive industries. While the refining and smelting industries which Hydro-Quebec has courted already consume 36 per cent of the province's

industrial electricity, they account for only 3 per cent of industrial jobs. 28/ Less capital-intensive industries may provide a more sustainable economic stimulus to the Quebec economy. Energy-intensive industries will, moreover, further disrupt the ecology of the province. Aluminum and magnesium smelters, heavily courted by Hydro-Quebec, are exempt from current provincial environmental assessment.

27. Critics of Hydro-Quebec believe that the utility vigorously courted transnational smelters and refiners, as well as United States customers, so that it could service its debt from previous projects, and to finance phase II. In 1990, interest payments on debt consumed 39.7 per cent of Hydro-Quebec's revenue. 29/ Hydro-Quebec carries more United States-dollar debt than any other corporation from an industrialized country, and further extensive borrowing is required to finance the Can$ 25 billion Great Whale and Nottoway/Rupert/Broadback projects. In March 1992, New York State cancelled its US$ 12.6 billion contract with Hydro-Quebec and significantly decreased a large part of the anticipated demand for electricity produced by phase II. The utility has meanwhile been raising its domestic rates. In the past year average monthly residential rates have risen from Can$ 100 to Can$ 112, and monthly rates could increase by Can$ 80 to Can$ 100 over the next decade, partly as a means to fund phase II, according to an energy-industry consultant for the Cree. 30/

28. A number of studies indicate that were Hydro-Quebec to serve only domestic markets and cease soliciting contracts with energy-intensive industries, conservation measures could eliminate the need for further hydropower development well into the next century. Quebec's Deputy Premier and Minister of Energy and Resources replies that Hydro-Quebec has already initiated a conservation programme, on which they plan to spend Can$ 1.8 billion. She claims that this programme rivals other conservation programmes undertaken by North American utilities. She states, however, that despite all efforts made by the Government and Hydro-Quebec, the growth in electricity demand on the year 2000 horizon is an inescapable reality. That growth is estimated at 2.6 per cent a year without energy efficiency measures and at 2 per cent with them. Given this, the Government must absolutely contemplate new generating equipment to cater to Quebec consumers. 31/

29. The necessity of phase II has been questioned by several energy economists, who have conducted extensive research into the proposed phase II development. They conclude, "If even a modest conservation programme were combined with a no export strategy, the need for any new hydro projects not currently under construction would be delayed until after 2010. In fact, with any significant amount of conservation, it is likely that no new hydro projects would be required prior to 2020". 32/ They base their conservation strategies on the Hydro-Quebec 1989 load forecast and Development Plan and assert that the cost of their proposed energy conservation measures are competitive with the cost of the planned hydro development.

30. A leading consultant with Torrie Smith Associates, an energy and environment research and consulting firm based in Ottawa, compared Hydro-Quebec's conservation strategy with that of neighbouring Ontario Hydro. Ontario Hydro plans to save 28 TWh by the year 2006, approximately 14 per cent

of estimated demand, with demand side management. He concludes that "Quebec, with a similar climate and industrial structure, but with a much higher use of electricity, should be able to achieve even higher percentage savings for lower costs. And yet, against a forecast demand in the year 2006 of 192 TWh, Hydro Quebec plans to save 12.8 TWh with its DSM programmes". This saving would represent only approximately 7 per cent of estimated demand. He goes on to state that "every indication, including Hydro-Quebec's own figures, is that a redirection of the $13 billion Great Whale investment toward conservation and electricity saving measures would save more than twice as much energy as the project itself is expected to deliver". 33/

31. The construction of phase II has been delayed pending a comprehensive environmental assessment. Under Canadian law, environmental assessment falls within federal jurisdiction if Indians, fisheries, navigable waters and migratory birds are involved. Land, wildlife, infrastructure and hydroelectric development fall within provincial jurisdiction. Since James Bay falls under both categories, both the Federal Environmental Assessment Review Office (FEARO) and the Quebec Government must complete environmental reviews. Quebec initially succeeded in convincing the Federal Government not to conduct an environmental review, however, the Cree objected, and, after a five-year court battle which ended in October 1991, the Canadian Government was ordered to conduct its own independent review. Hydro-Quebec said that it has undertaken to respect scrupulously the environmental review process and it has not undertaken any projects without having completed this process and obtained the required Government authorization. 34/

32. The guidelines for the environmental assessment were prepared by four committees: (1) the Kativik Environmental Quality Commission (KEQC), composed of five members appointed by the Province of Quebec and four members appointed by the Inuit; (2) the Evaluating Committee, composed of two members appointed by the Cree, two members appointed by the Quebec Government and two members appointed by the Federal Government; (3) the Federal Review Committee North of the 55th Parallel (FRC-North), composed of three members appointed by the Federal Government and two members appointed by the Inuit; (4) the Federal Environmental Assessment Review Panel (FEARP), composed of three members appointed by the Federal Government.

33. The environmental assessment itself is being conducted by KEQC, FRC-North, the Federal Review Committee South of the 55th Parallel (FRC-South), composed of three members appointed by the Federal Government and two members appointed by the Cree, the Provincial Review Committee, composed of three members appointed by the Quebec Government and two members appointed by the Cree, and FEARP. KEQC and the Provincial Review Committee provide recommendations to the provincial administrator of the Agreement who is also the Quebec Minister of the Environment, and FRC-North and FRC-South provide recommendations to the federal administrator of the Agreement who is also the chair of the FEARO. FEARP provides recommendations to the Canadian Minister of the Environment, Minister of Transport, and in some cases the Minister of Fisheries and Oceans.

34. The Cree argue that they play only a token role in this decision-making process, noting that the review committees provide only recommendations for mitigation, compensation or cancellation, and it is the Quebec and Federal Governments who will make the final decisions. The Cree also comprise a

minority in each committee on which they serve. Due to the scope of the James Bay project, the entire provincial and federal cabinets will probably be involved in the decision. Some express doubt as to whether a project of this economic and political magnitude would ever be cancelled by the Provincial or Federal Governments. Opponents of phase II development also express concern that the current constitutional situation between the Federal and Provincial Governments makes an unfavorable decision by the Federal Government unlikely. Whether or not Quebec would adhere to federal recommendations is also questioned. Finally, the Cree point out that a number of dams associated with Part II of phase I, a development which has at least comparable environmental significance with that of the Great Whale project, are currently under construction without any formal environmental assessment having been carried out. Hydro-Quebec currently plans to begin construction of phase II during 1993, once the environmental assessment is complete. 35/

2. The Blackfeet Nation, United States of America, and petroleum exploration

35. In 1983 and 1985, Fina Oil and Chemical Company (Belgium) and Chevron USA filed applications for exploratory oil and gas drilling within the Badger-Two Medicine area of the United States Lewis and Clark National Forest. The Badger-Two Medicine area is the northernmost portion of the Rocky Mountain Front and lies nestled between Glacier National Park to the north, Great Bear Wilderness and the Bob Marshall Wilderness to the west and south, and the Blackfeet Indian Reservation to the east. An initial decision by the United States Forest Service and the Bureau of Land Management (BLM) to permit Fina to begin drilling in the Badger-Two Medicine area has been suspended while the BLM reviews the surface impact of the drilling as detailed in the Environmental Impact Statement. A decision regarding the Chevron permit will be made following an ethnographic study of the southern portion of Badger-Two Medicine, the area to be directly affected by the Chevron proposal. The Blackfeet tribe claims ancestral rights to Badger-Two Medicine, and the Blackfeet Tribal Council and Blackfeet traditionalists associations are opposed to the drilling. They base their opposition, however, on very different foundations. A general examination of the controversy surrounding the proposed drilling illustrates the problems and complexities encountered when settling indigenous land claims, namely the failure of laws designed to protect traditional cultural and religious practices, managerial rights over the disputed territory, and divisions within Native American tribes concerning resource management.

36. The Blackfeet Nation is composed of three tribes: the Blackfeet, the Blood, and the Peigan. 36/ Buffalo constituted a large part of Blackfeet diet and culture. 37/ The destruction of the buffalo herds combined with the loss of vast amounts of land forced the Blackfeet to become gradually more dependent upon government aid for subsistence. The Blackfeet's last recorded buffalo hunt occurred in 1883, and by 1896, Blackfeet territory, which had initially covered approximately 70,000 square kilometres, was reduced to the present reservation size of 6,000 square kilometres. 38/

37. The Blackfeet Nation ceded the area containing the Badger-Two Medicine area to the United States Government in a 1895 treaty. The Blackfeet retained some rights upon the "ceded strip": "said Indians shall have, and do hereby,

reserve to themselves the right to go upon any portion of the lands hereby conveyed so long as the same shall remain public lands of the United States, and to cut and remove therefrom wood and timber for the agency and school purposes, and for their personal uses for houses, fences, and all other domestic purposes: and provided further that the said Indians hereby reserve and retain the right to hunt said lands and to fish in the streams ...". The Blackfeet permanently lost their treaty rights to the northern portion of the ceded strip when it became part of Glacier National Park in 1910. The approximately 53,000 hectares in the southern portion of the ceded strip (the Badger-Two Medicine area) became part of the Lewis and Clark National Forest and the Blackfeet retained treaty rights on this land.

38. All Blackfeet do not oppose the proposed drilling for the same reasons. The traditionalist associations, consisting of those Blackfeet who still practise traditional Blackfeet religion, maintain that any development intrusion into the Badger-Two Medicine area will destroy their ability to practise their religion, which is one of harmony with nature and the supernatural beings which inhabit the land. Traditional Blackfeet share a spiritual affinity with nature as a whole, and each part of the land, including rocks, plants, animals, natural formations and elemental processes, is seen as possessing a spirit. The disturbance of a specific component of the land results in a desecration of its ecological and spiritual unity and the Blackfeet's relationship with it. "While the Judeo-Christian religious tradition places no importance on land in general and focuses on specific sites, such as St.Peter's Square or the Wailing Wall, Native American religion and cultural practice is based on the primary overriding value of the sacredness of the land itself." 39/

39. Badger-Two Medicine is seen by many traditionalists as the last viable area in which to practise their religion. Two rituals currently practised in the Badger-Two Medicine area central to traditional Blackfeet religion are the vision quest and the Sundance, both of which require undisturbed wilderness. Blackfeet also still participate in traditional subsistence activities within Badger-Two Medicine. Molly Kicking Woman, an elder Blackfeet, stated, "Much of my learning took place in the mountains of the Badger-Two Medicine area. All of the mountains, and not just the area where we gather earth for paint and the places where we pick plants and roots, are important to our religion." 40/ The Blackfeet Tribal Council passed a resolution in May of 1973 declaring the entire Badger-Two Medicine area a sacred ground.

40. The traditionalists have based their formal opposition to the proposed drilling mainly on the National Historic Preservation Act (NHPA) and the American Indian Religious Freedom Act (AIRFA). Both laws are meant to help preserve culturally significant areas and make it possible for indigenous peoples to continue practising their traditional religions. They are mainly procedural, however, requiring federal agencies to consider the impact their activities may have upon indigenous religion and culture. Indigenous peoples play no direct role in the decision-making process, other than being consulted before a decision is made. These laws do not require federal agencies to withdraw project proposals even if they find that projects will have devastating effects upon the continuation of traditional practices.

41. NHPA mandates that federal agencies involved in a project first "take into account the effect of the undertaking on any district, site, building, structure, or object ..." of historical importance. NHPA authorizes the designation of an entire district as culturally significant. Examples are the Helkau Historic District in Six Rivers National Forest and the San Francisco Peaks in Arizona, both classified as significant districts because of their role in indigenous religious and cultural maintenance. The Forest Service refused to evaluate the Badger-Two Medicine area as a district, however, and instead planned to evaluate it on a site-by-site basis. The Forest Service has also divided its evaluation of the Badger-Two Medicine area into two sections, the northern portion in which Fina has applied to drill, and the southern portion in which Chevron has applied to drill. Traditionalists assert that to focus solely on specific sites, such as a particular spot that has been used for a vision quest or a particular mountain that may be utilized by some native practitioners, is to ignore the fundamental aspect of the Blackfeet traditional religious and cultural practices.

42. The Forest Service also appears to have circumvented the evaluation process prescribed by law. The law delineates means by which an agency identifies the possible existence of cultural areas within a project's area of impact and then describes procedures for determining if the area is significant. The Forest Service, by declaring that no cultural sites exist within the area to be affected by the Fina proposal, completely avoided the process which would determine if this area was eligible to be listed on the National Register of Historic Places. Further studies are to be done only on the area impacted by the Chevron proposal.

43. Concern about the Forest Service's research on the cultural impact of the Fina proposal has come not only from Blackfeet traditionalists, but from historians and anthropologists. The Montana State Historic Preservation Office reviewed the adequacy of the efforts of the Forest Service and offered a number of comments. The Office found that the Forest Service relied upon a limited range of archival and oral sources to arrive at its decision. They also advised the Forest Service that the division of the evaluation process for sites affected by the Fina and Chevron proposals may not be appropriate. 41/ The Chair of the Department of History at the University of Montana also found the ethnographic research conducted by the Forest Service to be lacking and urged "further professional attention and analysis". 42/

44. AIRFA states that "it shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites". Blackfeet traditionalists contend that drilling in the Badger-Two Medicine area would violate their freedom to worship, as described in AIRFA. The Forest Service maintains that their decision to permit exploration by Fina does not violate AIRFA, and point to the 1988 opinion of the United States Supreme Court in Lyng v. Northwest Cemetery Protective Association as a basis for this.

45. In Lyng v. Northwest Cemetery Protective Association, the Supreme Court ruled that a Forest Service logging road in northern California could be completed, despite its effects on indigenous religious practices. The Court arrived at this decision by interpreting the First Amendment to the United States Constitution narrowly: since indigenous peoples were neither punished for practising their religion nor coerced into violating their religious beliefs, the construction of the road did not impose a burden on their freedom of worship. The Court went on to question whether AIRFA applies at all to public lands, stating that "whatever rights the Indians may have to use of the area, however, those rights do not divest the Government of its right to use what is, after all, its land". As a result, federal agencies merely need to consider, but not defer to the concerns of indigenous peoples who use these lands for religious purposes.

46. Several members of Congress responded by introducing amendments to AIRFA in 1989. The amendments would have set compliance standards and given indigenous peoples the right to appeal decisions which infringe upon their religious activities. The Forest Service opposed these 1989 amendments, asserting that they were not "necessary, because existing statutes provide adequate protection to Native American culture and religion". 43/ In justifying their opposition, the Forest Service cited their compliance with the NHPA, among other laws, which they claimed already provide adequate involvement of indigenous people in land management decisions. A variety of indigenous, human rights and environmental organizations have formed a coalition to address weaknesses in AIRFA and propose new amendments, and the Senate Select Committee on Indian Affairs plans to hold oversight hearings on this issue.

47. The elected Tribal Council of the Blackfeet opposes the Fina drilling proposal, but the rationale of the Council is different from that of the traditionalists. First, the Tribal Council maintains that the Badger-Two Medicine area belongs to the Blackfeet Nation, and that in the treaty of 1895, the Blackfeet agreed only to lease the area to the United States Government for a 50-year period. Thus, land management decisions regarding the Badger-Two Medicine area should be made by the Blackfeet Tribal Council. Referring to the negotiating sessions of 1895, a Blackfeet position paper contends that, "Oral history of the Blackfeet holds that in an unreported session late the preceding night, the Blackfeet were told they could agree to a fifty year mining lease. It was this new option that the Blackfeet agreed to on 25 September 1895. This resolution of the contentious issue was not reported by the Commissioners and is not contained in the Agreement ratified by the Congress in 1896." 44/ The Blackfeet Tribal Council maintains "that it is the desire of the Blackfeet People to have the lands within the Blackfeet Unit/Badger-Two Medicine area returned". 45/

48. Realizing, however, that it is highly unlikely that the Forest Service will relinquish the Badger-Two Medicine area to the Blackfeet, the Council supports the Montana Wilderness Bill, which has been passed by the Senate and is currently awaiting action by the House of Representatives. If approved, it would temporarily halt development within the Badger-Two Medicine area, and mandate Blackfeet involvement in future management. A committee comprised of

representatives of the National Park Service, environmental groups, industry groups and representatives of the Blackfeet tribe, including Blackfeet traditionalists appointed by the Blackfeet Tribal Council, would consult with the Forest Service in devising a comprehensive management plan for the Badger-Two Medicine area which would then be submitted to Congress for approval. Most traditionalists have misgivings about supporting the Montana Wilderness Bill, since the designation of the Badger-Two Medicine area as a temporary wilderness area does not necessarily preclude future commercial resource development. Indeed, while the Tribal Council opposes the Fina proposal, they are not necessarily opposed to all development of the Badger-Two Medicine area. Some members of the tribe believe that permanently removing the Badger-Two Medicine area from resource development opportunities would deny the reservation economy much needed stimulus. The 1990 per capita income on the reservation averaged US$ 4,718 (1989 dollars), 46/ and unemployment is estimated to be between 40 per cent and 50 per cent. 47/

49. This dispute between resource development proponents and opponents has placed Blackfeet individuals and associations in direct conflict with each other. The traditionalists are dissatisfied with the Montana Wilderness Bill, preferring that the wilderness qualities necessary for religious practice in the Badger-Two Medicine area be guaranteed for ever, rather than left open for possible future development. Moreover, conflict has arisen between traditionalists and the Blackfeet Tribal Council regarding who should have authority in appointing representatives of the Blackfeet traditional community to the Badger-Two Medicine area management committee of the Montana Wilderness Bill. The Blackfeet Tribal Council has successfully argued that the Tribal Council should appoint traditionalist representatives, while the traditionalists assert that they, not the Tribal Council, should decide who will represent them on the management committee. This sensitive issue remains unresolved and may jeopardize a unified position in opposition to future development of the Badger-Two Medicine area.

3. Akwesasne, United States of America, and industrial development

50. The Akwesasne Mohawk Nation is located on the St. Lawrence River, on lands bridging New York State, United States, and the Province of Ontario, Canada. The reservation, which includes Cornwall Island and St. Regis Island, consists of approximately 6,000 hectares and is home to 2,000 Mohawk people. Traditional Mohawk territory extended farther into the Provinces of Quebec and Ontario, where there are several other Mohawk communities today, including Kahnawake in Quebec, and the Six Nations Reserve in Ontario.

51. Prior to European colonization of North America, Mohawk people lived in large, fortified agricultural towns. They grew corn, beans and squash, and supplemented this diet by hunting and fishing. As a member of the Six Nations Iroquois Confederacy, they were part of one of the longest and most effective diplomatic and military challenges to the European invasion. After two centuries of intermittent warfare and treaty alliances with Dutch, French and British colonists, the Six Nations were forced to choose between remaining on small reservations making up less than 1 per cent of their traditional territory, or in some instances removal to lands west of the Mississippi River far from European settlers. 48/

52. The international border has played an important role in recent Six Nations history. A large part of the Mohawk nation led by Joseph Brant fought on the British side during the American Revolution (1774-1783), 49/ only to find their families and communities divided by the new border between the United States and Canada. A 1794 commercial treaty between the United States and Great Britain ("Jay Treaty") which guaranteed indigenous peoples freedom of trade and travel across this border has not been fully respected. The Six Nations likewise have never recognized the legal validity of the border, and continue to challenge restrictions on their freedom to cross it, frequently carrying their own passports. They moreover refused to be drafted into the armies of either Canada or the United States, but served in both on a voluntary basis, even making their own declarations of war against the Central Powers in 1917 and the Axis Powers in 1941.

53. European settlements and the establishment of small reservations in the early nineteenth century reduced hunting and increased the importance of Mohawk agriculture, which adapted to European crops and livestock. Mohawk communities continued to be largely self-sufficient, insulating them from some of the worst social and cultural effects of government paternalism on reservations elsewhere. In the 1880s, however, former Six Nations lands became heavily industrialized. The Aluminum Company of America (Alcoa) built its first smelter one kilometre from Akwesasne in 1903. Completion of the St. Lawrence Seaway in the 1950s and the availability of inexpensive hydropower attracted more aluminium plants to the vicinity of Akwesasne. Many Mohawks responded to these changes by finding employment as ironworkers, both in factories and in "high-steel" (high-rise) construction projects, a role in which they became legendary. 50/ When the regional metals industry declined in the 1980s, most of these jobs were lost, but the environmental impact of nearly a century of industrial activity remained. Mohawks found themselves a farming people in the middle of the American "rust belt". 51/

54. Three aluminium smelting and casting factories are still operating within a kilometre of Akwesasne lands: a 1,400-hectare facility with 1,200 employees established by Alcoa (United States) in 1903; a 650-hectare facility with 700 employees built by Reynolds Metals Co. (United States) in 1958; and a 110-hectare plant with 300 employees operated by General Motors (United States) since 1959.

55. The Alcoa and Reynolds facilities have reportedly discharged PCBs into the St. Lawrence River, and fluorides into the atmosphere. Toxic wastes have accumulated in ponds and land-fills at both sites within a few hundred metres of the St. Lawrence River, just upstream of Mohawk reservation lands. In July 1991, Alcoa executives pleaded guilty to charges that they had illegally kept quantities of hazardous waste at their facility, falsified documents to conceal what they were removing from it for dumping elsewhere, and released PCBs and other hazardous materials into the environment. 52/ Alcoa paid $7.5 million in criminal fines and civil penalties for these violations, and agreed to detoxify the site at a cost expected to exceed $200 million. 53/

56. The General Motors facility stores toxic waste within 100 metres of Mohawk reservation lands and waters, and in 1983 was designated as a "Superfund" site by the United States Environmental Protection Agency. 54/

The site contains an estimated 800,000 tons of PCB-contaminated materials. In addition, General Motors' casting process uses styrofoam, and this releases toluene into the atmosphere. 55/

57. Two other manufacturers are located directly opposite Akwesasne, on the Canadian side of the St. Lawrence River: ICI Cornwall Chemicals (a subsidiary of the United Kingdom transnational Imperial Chemical Industries), and Domtar Pulp and Paper (a Canadian transnational firm partly owned by the Province of Quebec). ICI Cornwall's chlor-alkali plant uses an outdated mercury-cell process that releases metallic mercury into the river. Domtar's paper-manufacturing process releases phenols into the river, and possibly dioxins and furans as well. Mohawks brought legal proceedings against both companies a decade ago in Canada, but settled out of court for $650,000 when their funds to continue were exhausted. Canadian authorities have taken no effective action since then against either company.

58. In 1985, the Mohawk Council of Akwesasne began warning people not to eat fish taken from the St. Lawrence River. The number of Mohawk commercial fishers has reportedly fallen from 100 to 10, and the tribe has launched an aquaculture programme to combat this decline. Trout and bullhead are grown in cages suspended at several points in the river. Funds are provided by non-governmental organizations, and many Mohawks volunteer to help. It is not yet known whether these fish will be too contaminated to eat, however. Farming has also been affected. Small, individually owned dairy farms have always been an important source of food and income for Mohawk families, but fluorides from nearby plants have reportedly poisoned cattle and led to a decrease in the number of Mohawk farming families from 120 to 20. Vegetables grown in household gardens are no longer considered safe to eat.

59. Mohawk people were not involved in planning these facilities, and only a small number of Mohawks are employed in operating them - only as many as are required by Federal "affirmative action" laws, according to the Mohawk Council. Mohawks are nevertheless participating in public studies of site remediation plans, and aluminium companies contributed $600,000 to the Mohawk Council for research on environmental impacts. Mohawks have not been involved in efforts by the Province of Ontario to reduce air and water pollution from plants located on the Canadian side of the river, however. In this regard United States environmental law has been more favourable to participation by the people most affected, although it does not afford indigenous peoples, as such, any special or distinct rights to environmental safety.

60. The situation at Akwesasne reflects the logical conclusion of an industrial policy that favoured growth at the expense of environmental precautions. The region prospered for a half-century, contributing to the national economic growth of both Canada and the United States, but hazardous by-products accumulated steadily, and the danger they pose to human health can no longer be ignored. The cost of removing them will not only render many ageing factories unprofitable, but jeopardize the financial viability of the companies that built or currently own them.

61. Similarly, there are few effective mechanisms for protecting indigenous peoples' lands from contamination, even if indigenous ownership is recognized. If aluminium companies had been required to include the local

community in lease negotiations, it is likely that greater care would have been exercised with respect to environmental safety. On the other hand, Mohawks today are more aware of the environmental effects of mercury, PCBs and fluorides than when these plants began operating 30 to 90 years ago.

62. The industrialization and deindustrialization of the St. Lawrence region has had a profound cultural as well as environmental and economic impact on Mohawk people. The decline of farming and fishing has made Mohawks dependent on other sources of livelihood, disrupting the close relationship which formerly existed between agriculture, religion, and traditional forms of community government. Employment in industry has now declined as well, adding growing poverty to individual competition and weakened traditional values. The most profitable activities still available are running gambling casinos and the sale of untaxed alcohol and tobacco, which both rely on disputed "loopholes" in Federal laws. 56/ Many Mohawks regard these activities as further threats to traditional culture and values, and violent confrontations erupted at Akwesasne in 1989 and 1990, resulting in two deaths and intervention by hundreds of police. 57/

63. With a strong traditional cultural and religious element, Mohawks are sharply divided over the direction of further social and economic changes. Environmental degradation has sharply limited their options, and placed the entire community at risk, not only from toxic materials but from the violence associated with loss of hope and frustration.

4. The Kuna, Panama, and biosphere reserves

64. The Kuna Indians of Panama have been relatively successful in defending their cultural and political autonomy, maintaining legal land rights and to a large extent preventing the type of development and environmental degradation that has affected other indigenous groups.

65. The Kuna, whose population in 1991 was approximately 50,000, are one of the largest indigenous peoples in Panama. The majority of the Kuna live in the comarca of San Blas which is located in eastern Panama and extends approximately 200 kilometres from the Mandinga river to the Colombian border. In the San Blas region there are 50 island villages and 12 mainland villages with populations that range from 100 to 5,000. In addition, there are also some 1,500 Kuna who live in the Bayano region which is located in south central Panama just west of the Comarca San Blas, and three small settlements in northern Colombia inland from the Gulf of Uraba. 58/

66. The San Blas and Bayano regions contain some of the last remaining tracts of tropical rainforest in Panama and many natural resources on which the Kuna depend. The Kuna have been able to survive for hundreds of years by managing the areas' natural resources in a relatively sustainable fashion. They engage in fishing, fish being their primary source of protein, and cultivate the soils on the mainland. Their main crops are plantains, avocados, corn and several types of tubers. In addition, they produce coconuts which, along with traditional mola blouses that are sold to tourists, provide them with a source of income. 59/

67. Although these areas are within 100 kilometres of Panama City, they were relatively undisturbed and isolated from the rest of the country until the mid-1970s, when the Government of Panama opened a portion of the Pan-American highway that traversed the Bayano region and built a branch of this highway from El Llano to Carti, just north of the San Blas region. These roads were a part of the Government's effort to open up this region so that landless peasants from the interior of the country could settle there. 60/ The Government also built these roads in order to make the region's natural resources accessible, particularly timber and hydroelectric power.

68. The construction of these roads led to an influx of colonists, cattle ranchers and timber companies. This resulted in large-scale deforestation that posed a serious threat to the Kuna's lands and to the natural resources on which they depend. In 1977 the Panamanian Government also built a dam in the Bayano region that had a severe impact on the Kuna who live there.

69. By 1975, the Kuna in San Blas had become aware that the increasing tide of settlers was posing a threat to their lands and the forests in the comarca. They decided to take action to protect their lands from incursion, and requested assistance from scientific organizations, such as the Centro Agronómico Tropical de Investigación y Ensenanza in Costa Rica (CATIE), that shared an interest in preserving the forests in San Blas, albeit for scientific rather than socio-cultural and economic reasons.

70. The resultant actions taken by the San Blas Kuna have led to the development of the Kuna Yala Wildlands Investigation Project (PEMASKY), one of the most successful efforts of combining environmental preservation, cultural autonomy and development. This project consists of a park or biosphere reserve that covers some 20 square kilometres of natural forest in the comarca of San Blas in Panama. It is the first park of its kind created and run by an indigenous people. 61/ The Kuna created the reserve in 1983 with the assistance of scientific organizations (CATIE and the Tropical Science Centre in San José) and development aid institutions (Inter-American Foundation and USAID). 62/ The reserve, in which by law no non-Kuna can claim land, was established to protect the forest and the Kunas' homeland from the type of rapid deforestation that has occurred throughout Panama and most of Latin America.

71. In conjunction with cooperating scientists, the Kuna developed the idea of using a forest park as a means of preserving their lands and the local environment. Next, with funds from USAID, several Kuna were trained at CATIE in park management. By mid-1983 they had also managed to select a "planning committee of young Kuna professionals and enlisted financial and technical support from local and international institutions". 63/ At this point, the Kuna were prepared to establish a forest park that they would manage and control.

72. Even though the San Blas Kuna have sought and obtained financial and technical assistance from outside their community, they have never relinquished control over the project. The park is entirely managed by the Kuna, and is patrolled by Kuna forest rangers. 64/ In addition, all the tourism and lodging sites for visiting tourists and scientists are under the control and management of the Kuna. Through the establishment of this

park the Kuna have thus been able to maintain their autonomy and control decision-making processes that affect their lives and land, and at the same time they have been able to benefit from environmentally sound development.

73. In the Bayano region the Kuna have also maintained strong political and cultural autonomy, but in contrast to the San Blas Kuna they have experienced large-scale loss of their lands, and have been less able to prevent the degradation of their forests and other natural resources. In the early 1970s, the Government-owned Panama Power and Light Company began to build the Bayano Hydroelectric complex on the Bayano river. 65/ The dam, which was part of the Government's strategy for increasing domestic energy production, was completed in 1975 and began operating in 1977. The lake created by the dam flooded 80 per cent of the land in the reserve where the Kuna lived, and to which they had legal land rights. 66/

74. By 1973 it was clear that 7 of the 10 Kuna villages in the region would be affected by the dam. In response to this situation, the Government sought to relocate these villages to the Pyria region which was adjacent to the Bayano reserve; the Kuna steadfastly refused to be relocated and instead stated that they preferred to stay within what remained of their reserve. The Government eventually acquiesced, and allowed the Kuna to annex the Pyria area. Despite repeated assurances from the Government, the Kuna have been unable to have this extension demarcated or secure effective legal control over it. 67/

75. Since the 1970s, the Bayano region has experienced deforestation, in part due to logging by the Government-owned company MADECA. None the less, the Kuna have been able to maintain control over logging concessions in the region, and force MADECA to pay taxes to them on the logs that they harvest. In 1979 the Kuna signed a contract with MADECA which imposed a $2-3 tax on each log. MADECA did not live up to some of the commitments that it made, and in early 1980 the Kuna declared the contract invalid and forced MADECA to sign a new one that imposed higher taxes and stricter regulations on the company's workers. 68/

76. It is evident that one of the main reasons why the Kuna have been able to regulate and tax logging in the Bayano region and develop the PEMASKY project is that they have a well-established system of government both at the village and regional level. According to Howe, "over the course of 80 years the Kuna have gone from a system of largely autonomous villages grouped together in a weak confederacy to a more complex and formalized regional structure encapsulated within and incorporated into a modern nation". 69/ The main governing body within this structure is the Kuna General Congress. There are two General Congresses, one that represents all the Kuna villages in the comarca San Blas and one that represents those in the Bayano region. It is partly as a result of this complex system of governance that the Kuna have been able to maintain a high level of political and cultural autonomy within the context of the Panamanian nation-State.

77. In cases where they have had to interact with TNCs, the Kuna have also been able to use their strong political cohesion and the General Congress as a means of pressuring the company to accept conditions that are favourable to the Kuna. Although there are no TNCs currently operating in the areas where

they live, for years Kuna have travelled to the Bocas del Toro region, in northern Panama on the Costa Rican border, to work on a banana plantation owned by a subsidiary of United Brands Company, a transnational corporation with headquarters in New York City. United Brands produces fruits and vegetables in many countries in the Third World, and has had banana plantations in Costa Rica and Panama since the 1880s. 70/

78. There are many different ethnic groups, including several other indigenous groups, that work on this plantation. However, the Kuna have historically been able to obtain better paying jobs and in some cases better working conditions. This has happened largely because the Kuna are represented by their General Congress, which negotiates on behalf of all, and their own union, Union de Trabajadores Kuna (UTRAKUNA). This has allowed them to present a unified front vis-à-vis United Brands. 71/ As a result, the Kuna, unlike other ethnic minorities working on the plantation, have achieved a strong bargaining power and have been able, in many cases, to force United Brands to accept their demands.

79. The Kuna's ability to negotiate with a powerful TNC like United Brands, developing the PEMASKY project, and maintaining their autonomy is also due to the fact that their socio-economic and educational status is better than most other indigenous groups in Latin America. Some Kuna villages have had primary schools for decades, and more schools have continued to be established. In addition, three of the islands where the Kuna live have secondary schools, and a number of Kuna have attended the national university. 72/ The Kuna as a group thus have a high level of formal education, which has undoubtedly helped them in dealing with outside scientists, business people and politicians in a mutually beneficial way.

80. The relative prosperity of the Kuna is due mainly to their production of coconuts, for which there is a stable market nearby, and of mola blouses which are highly prized by tourists. In addition, some educated Kuna have obtained well-paid jobs in nearby cities like Panama City. 73/ As a result, Kuna villages have access to cash while avoiding the indebtedness that has forced many other indigenous peoples into a situation of aid-dependence or debt-bondage. The Kuna's ability to develop, manage and maintain autonomy over the PEMASKY project and the rest of their lands is probably also largely related to their economic independence.

81. It is as a result of the circumstances that the Kuna have been able to successfully participate in Panamanian society without losing their socio-cultural and political independence and identity. Yet, despite these factors and the success of the PEMASKY project, the Kuna today are faced with increasingly severe threats to their lands and livelihoods.

82. In the Bayano region the non-Kuna population increased from 5,000 in 1980 to 20,000 in 1988, and cattle ranching and logging have replaced horticulture as the primary economic activities. 74/ The San Blas region has experienced an invasion of Colombians and Panamanian nationals who go to mine gold in Rio Pito and Marrandi in the southern part of the comarca. Tourism in the San Blas region has also led to a decrease in the abundance of fish and fauna, undermining traditional economic activities and lifestyles.

83. In addition, the price of coconuts, one of the Kuna's primary sources of cash income has fallen, while the prices of the commodities that Kuna need to purchase have increased. Whether the Kuna will be able to develop ways to overcome these problems is unclear, but there is at least a strong precedent that suggests that the Kuna will be able to adjust and find solutions that do not threaten their autonomy or the natural resources on which they depend. The Kuna have shown that, given political recognition and land rights, indigenous peoples are fully capable of participating in a meaningful way in the development of useful solutions to the socio-economic, cultural and environmental problems that affect them.

84. They have also demonstrated that it can be in the interest of both the scientific/environmental community and indigenous peoples to pursue solutions that foster both environmental preservation and economic opportunity. It is possible that other indigenous peoples, particularly in the Andean countries where they enjoy relatively high levels of formal education, including university level, and retain established structures of governance, can, like the Kuna, successfully develop solutions to environmental and economic problems. In order to do so, however, they will probably need to gain the support of national and international scientific, environmental and development institutions that are able to exert some degree of influence within their countries.

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